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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996 Amendment of the Commission's Rules and Policies Governing Pole Attachments	CS Docket No. 97-151

COMMENTS OF ICG COMMUNICATIONS, INC.

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COMMENTS OF ICG COMMUNICATIONS, INC.

ICG Communications, Inc. ("ICG") hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. ICG is a diversified competitive telecommunications carrier that has been engaged in the provision of telecommunications services, including facilities-based competitive access services and interexchange, international and maritime voice and data services, since 1984. ICG is currently providing or in the final stages of preparing to provide local exchange services in over twenty metropolitan areas across the United States. In these Comments, ICG addresses most of the issues raised in the NPRM, as well as many of the contentions raised in the position paper titled *Just and Reasonable Rates and Charges for Pole Attachments: The Utility Perspective* that was filed with the FCC on August 28, 1996 by McDermott, Will and Emery on behalf of a group of electric utilities (the "Whitepaper Utilities").[1]

[1] The Whitepaper Utilities are American Electric Power Service Corp., Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida

I. Summary of Position

The Commission proposes to require telecommunications carriers to engage in good faith negotiations with a utility concerning rates before filing a complaint with the Commission and to summarize their attempts at negotiation in any filed complaint. The competitive harm that telecommunications carriers can suffer due to delays in obtaining access to utility poles, ducts, conduits and rights-of-way gives utilities leverage that some can and do use to impose excessive rates and unreasonable terms and conditions, however, and the Commission needs to do more to facilitate negotiations on an equal footing. The Commission should give telecommunications carriers the option of attaching their facilities before they reach agreement with utilities on rates, terms and conditions and should clarify that good faith requires utilities to agree to appropriate most favored nations provisions.

Dark fiber leasing fosters the development of a competitive facilities-based telecommunications market by providing a method for the sharing of costs associated with the installation of cables along a particular route while imposing no additional burden or obligation on the utility that owns the poles, ducts, conduits or rights-of-way on which the cable is installed. Accordingly, the Commission should encourage dark fiber leasing by prohibiting utilities from restricting, conditioning or charging additional fees for the leasing of dark fibers.

Power & Light Company, Northern States Power Company, The Southern Company, and Washington Water Power Company.

Similarly, overlashing provides an economical alternative to replacing poles in order to make more space available and thus facilitates the installation of competitive telecommunications facilities. The Commission should adopt access and rate policies that encourage overlashing while requiring overlashing parties to coordinate their work with pole owners and other pole users.

Although attaching entities generally should be required to comply with reasonable permitting and pre-approval procedures, utilities are similarly obligated to process approvals and perform makeready work in a timely fashion. The Commission should require utilities to delegate permit reviews and makeready work to outside contractors or attaching parties if such is necessary in order to provide timely responses and should authorize telecommunications carriers to proceed without pre-approval when faced with unreasonable delays on the part of utilities.

The Commission should require pure cable television ("CATV") operators to certify the use of their facilities under oath and require utilities to investigate and remedy allegations that CATV operators are providing telecommunications services while paying lower pole attachment rates than other carriers.

The Commission should mandate the development of a uniform system for the identification of facilities installed on and in utility poles, ducts, conduits and rights-of-way, probably through a negotiated rulemaking.

The Commission's previously adopted rebuttable presumptions concerning average pole height, usable space and unusable space are either outdated or based on incorrect assumptions and should be revised. The average height of a pole today is most likely

forty feet. The forty inch clearance space on a pole between electric utility and communications facilities benefits all users and should accordingly be treated as unusable, not usable space. An allowance must be made for line sag when determining the lowest point of attachment to a pole, but the minimum ground clearance required below a communications line is only sixteen, not eighteen feet. Accordingly, the Commission should adopt a presumption that the average pole is forty feet long, with thirteen feet of usable space and twenty-seven feet of unusable space.

When apportioning the cost of unusable space, the Commission should treat each user of a pole or conduit as a single attaching entity, regardless of the number of attachments or the amount of usable space they occupy. This is the only approach that is consistent with the Congressional mandate that two-thirds of the cost of unusable space be apportioned equally among all attaching entities.

The Commission should utilize the results of field surveys that are already conducted by parties to pole attachment agreements to develop a presumptive average number of attaching entities on each shared use pole.

The Commission's presumption that each communications cable occupies one foot of usable space on a pole, if it was ever valid, is outdated. The National Electrical Safety Code ("NESC")[2] supports an allocation of six inches of usable space for simple communications attachments located in the communications space on the pole, nine inches for overlashed cables, and sixteen inches for communications cables located in

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[2] Unless otherwise indicated, all citations herein to the NESC are to the 1997 Edition: Institute of Electrical and Electronics Engineers, Inc., *National Electrical Safety Code* (1996).

the electric supply space. Such usable space allocations recognize generally accepted engineering standards and promote the economically efficient use of pole space.

The Commission correctly proposes that incumbent LECs be counted as attaching entities when apportioning the cost of unusable space. The Commission should, however, permit telecommunications carriers to sublease from incumbent LECs any available space on electric utility poles that is reserved for their use.

The Whitepaper Utilities have cited numerous safety concerns that they contend justify denial of access to electric utility ducts, conduits and transmission facilities in many cases and warrant a deregulatory approach to access to and rates for the use of such facilities by telecommunications carriers. These safety concerns are significantly overstated and often used as a basis for discrimination with regard to access. With one exception, safety concerns can be adequately addressed by requiring telecommunications carriers to use contractors pre-approved by the electric utility or, in extreme cases, to have all installation and maintenance work performed by the utility's own personnel.

Because of the costs of delay and the uncertainties of rate litigation in the absence of a clear rate formula or methodology, a case-by-case approach to rates for the use of ducts and conduits encourages utilities to engage in price-gouging and discrimination. Rates proposed by utilities for the use of their ducts and conduits vary widely, and many electric utilities demand rates significantly higher than those charged by incumbent LECs, who have powerful incentives to overcharge their competitors. It is essential that the Commission adopt a clear methodology for determining duct and conduit lease rates so that negotiating parties can determine reasonable rate levels. Because of utilities'

concerns that telecommunications carriers will occupy duct space later needed for utility operations, requiring the construction of new ducts at costs significantly higher than the historical cost of existing ducts, it may be appropriate to base duct rates on current costs, rather than embedded accounting costs.

The Commission's proposal to allocate the cost of ducts and conduits between usable and unusable space based upon the number of usable and maintenance ducts is a straightforward and reasonable approach. The Commission's proposed "half-duct" methodology, however, ignores the widespread use of innerduct. Each cable should be rebuttably presumed to occupy one-fourth of a duct in densely developed areas and an entire duct in rural areas. As in the case of facilities installed on poles, the Commission should treat each entity with facilities in a duct or duct bank as a single attaching entity when apportioning the cost of unusable space, regardless of the number of cables or the space occupied.

II. The Commission Must Equalize the Bargaining Power of Utilities and Telecommunications Carriers Before Relying Upon Negotiations to Establish Rates, Terms and Conditions for Pole Attachments.

In the NPRM the Commission notes that under § 224(e)(1) its role in setting pole attachment rates is limited to circumstances "when the parties fail to resolve a dispute over such charges." The Commission states its belief that negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved. Accordingly, the Commission proposes to require that an attacher attempt to negotiate and resolve its dispute with a utility before filing a complaint with

the Commission and that a complainant include a brief summary of all steps taken to resolve its dispute before filing a complaint.

The Whitepaper Utilities essentially agree with the Commission's position, arguing that negotiations should be the prevailing means of determining a rate for access by telecommunications carriers to infrastructure owned by utilities. They contend that good faith negotiations aimed at reaching a pro-competitive agreement over the rates, terms and conditions upon which pole attachments are made, rather than a demand for an artificial, regulated rate, are consistent with Congressional intent. The Whitepaper Utilities also argue that a voluntarily negotiated pole attachment agreement must be binding on the parties, just as a voluntarily negotiated interconnection agreement under § 252(a)(2) is binding on the parties.

ICG generally supports the Commission's reliance upon good faith negotiations to establish the rates, terms and conditions for access to utilities' poles, ducts, conduits and rights-of-way in most cases. ICG submits, however, that it is not sufficient for the Commission to require negotiations before the filing of a complaint. Instead, the Commission should decouple the issue of access to poles and conduits from the negotiation of rates in order to equalize the bargaining power between the parties to pole attachment negotiations and should provide guidance concerning what constitutes good faith negotiation over pole attachment rates, terms and conditions.[3]

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[3] The Commission has previously provided similar guidance in its discussion in *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, ____ FCC Rcd. ____ at ¶¶ 1119–1240 (August 8, 1996), *rev'd in part on other grounds sub nom. Iowa Utilities Board v. FCC*, 1997 U.S. App. LEXIS 18183 (8th Cir. 1997) (the "Interconnection Order") of good faith negotiation of

A. The Leverage Provided to Utilities by Delay Impairs the Ability of Telecommunications Carriers to Construct Facilities to Provide Competitive Telecommunications Services.

Although Congress clearly intended that telecommunications carriers and utilities attempt to establish reasonable and nondiscriminatory rates, terms and conditions for pole attachments through negotiation before invoking the Commission's processes, by amending § 224 to bring telecommunications carriers' pole attachments within its scope Congress also demonstrated an awareness of the economic realities facing competitive access providers and local exchange carriers. In particular, in the current economic climate, time to market is critical, as a telecommunications carrier's request to a utility for a pole attachment agreement is often prompted by the need to construct facilities to serve a particular customer. It is not uncommon for two or more carriers to be competing to meet a customer's needs. As such, the carrier that is able to provide service first or that is best able to meet the customer's deadline is most likely to receive its business. Under such circumstances, reliance upon negotiations, without clear regulatory guidance, to establish pole attachment rates, terms and conditions provides utilities with the means to exert leverage through delay. Carriers are commonly faced with the choice of agreeing to a utility's proposed rate in order to obtain an agreement in time to serve the customer or filing an access or rate complaint with the Commission that stands little chance of being resolved before service to the customer must commence. In fact, like most other carriers, ICG has missed business opportunities because of delays in obtaining pole

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interconnection and resale terms and in connection with the obligation of incumbent microwave licensees to negotiate in good faith with PCS licensees concerning the relocation of the incumbents from spectrum that has been reassigned for PCS.

attachment agreements, has incurred higher makeready costs because of delays that have allowed other carriers to occupy available pole space, and has been forced to pursue alternative and more expensive routes or methods of construction because of delaying or obstructionist tactics employed by utilities.

At the same time, utilities are understandably reluctant to compromise on rates or even to cooperate with efforts to reach an agreement quickly if they have no assurance that carriers will be held to their agreements. In its administration of § 224 to date, the Commission has reasoned that the fact that a CATV operator or telecommunications carrier would agree not to challenge a utility's pole attachment rates in order to obtain prompt access to its poles demonstrates the unequal bargaining power that was the principal reason for the enactment of the Pole Attachment Act, and it has come close to saying that such agreements are *per se* invalid.[4] As a result, CATV operators often have agreed to utilities' requested rates in order to obtain access to their poles, agreed not to challenge those rates before the Commission, and then successfully challenged the rates nonetheless as soon as their facilities have been installed. Such a regime gives utilities little incentive to compromise or to respond quickly to requests for pole attachment agreements.

Even if a carrier is prepared to accede to a utility's demands, it may nevertheless incur unnecessary costs and be subjected to unacceptable delays. This is illustrated by ICG's

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[4] *See* Letter from Meredith J. Jones to Danny E. Adams, Esq. dated January 17, 1997 (DA 97–131) (hereinafter cited as "Jones Letter").

recent experience with one of the Whitepaper Utilities, Duke Power Company.[5] In late 1996, ICG approached Duke Power seeking a pole attachment agreement in order to construct fiber optic facilities to serve a prospective customer. Although ICG had previously entered into several pole attachment agreements with Duke Power, Duke demanded various changes in the terms of the agreements.[6] Correctly anticipating that Duke Power's insistence upon further negotiations would significantly delay the construction of its facilities, ICG proceeded to install the fiber optic line underground while negotiating the pole attachment agreement. Even though ICG agreed to every substantive term demanded by Duke Power, by the time the agreement was ready for execution ICG had completed construction of the route except for two road crossings that could not be installed underground. Because the two crossings did not involve contiguous poles, Duke Power then insisted that they constituted two separate routes.

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[5] ICG does not mean to imply that all negotiations concerning pole attachments are protracted or that all utilities are unreasonable. ICG has cooperative and productive relationships with many electric utilities, including some of the Whitepaper Utilities.

Duke Power Company, however, will not permit a telecommunications carrier that is not a CATV operator to install facilities on its poles unless the carrier agrees to a rate significantly higher than those that Duke Power charges for attachments by CATV operators and government entities who provide telecommunications services, waives the right to seek rate relief for ten years, and provides a legal opinion that such a waiver is enforceable. Moreover, Duke Power requires a separately negotiated pole attachment agreement for each route on which a carrier seeks to install facilities. Upon information and belief, Duke Power also charges its own telecommunications affiliate a lower pole attachment rate than it charges to non-affiliated telecommunications carriers that are not CATV operators.

[6] These changes included changes in the wording of ICG's waiver of the right to bring a pole attachment rate complaint and in the legal opinion concerning that waiver in an effort to distinguish the circumstances from those discussed in the Jones Letter.

This insistence resulted in the execution of two pole attachment agreements, one agreement covering two poles and a separate agreement covering five poles, each requiring a security bond in the same amount that Duke Power requires for an agreement covering up to 200 poles. The underground route cost substantially more to construct than it would have cost if it had been installed entirely on Duke Power's poles, even allowing for several years of pole attachment fees at rates significantly in excess of those paid to Duke Power by some of ICG's competitors, but if ICG had waited to construct the route until it had a pole attachment agreement with Duke Power — or obtained a ruling from the Commission on an access complaint — it would not have been able to complete it in time to meet the customer's deadline.[7]

B. The Commission Should Give Telecommunications Carriers the Option to Proceed with the Installation of Facilities While Continuing to Negotiate Pole Attachment Rates, Terms and Conditions.

While the Commission has already recognized that a pole attachment agreement is not a prerequisite to a telecommunications carrier's right to attach its facilities to a utility's poles, ducts, conduits and rights-of-way pursuant to § 224,[8] carriers in many cases are subjected to unnecessary costs and delays and to excessive pole attachment rates as a result of the unequal bargaining power between utilities and attaching parties. In order

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[7] ICG presents aspects of its negotiations and agreements with Duke Power as an example of the problems that can be caused by reliance upon private negotiations to establish the rates, terms and conditions for pole attachment agreements when utilities have substantially greater bargaining power because of the costs that delay can impose upon telecommunications carriers. ICG and Duke Power are, however, in the process of implementing and performing their agreements.

[8] Interconnection Order ¶ 1160.

to equalize the positions of carriers and utilities, the Commission should adopt a rule that telecommunications carriers may at their option begin the installation of their facilities before reaching agreement on a pole attachment rate. By doing so, the Commission can require parties to be bound by any rate ultimately determined by agreement or litigation without providing opportunities for abuse by utilities. Such a rule would prevent utilities from coercing carriers into agreeing to excessive rates through the leverage provided them by the costs of delay, yet provide them with necessary assurances that if they compromise on rates they will not be forced to reduce them at a later time.

In some cases it is readily apparent that a utility is unlikely to agree to reasonable pole attachment rates, terms and conditions, and in such cases telecommunications carriers should be free to seek relief from the Commission without the need to engage in futile negotiations. In other cases, however, negotiations may be fruitful if conducted on an equal footing. In order to permit negotiations to proceed in such cases, a telecommunications carrier should be given a defined period of time, perhaps a year, after the initial attachment of facilities either to reach agreement with the utility or to seek a determination from the Commission. In the absence of an express agreement, a telecommunications carrier that did not file a complaint within that time would be deemed to have agreed to the lowest rate offered by the utility, and a carrier that did file a complaint would be liable for the lowest rate offered by the utility from the time of attachment until the date of the complaint. Such a policy would provide telecommunications carriers with the assurance that they can negotiate rates without

undue time pressure and give utilities the assurance that they can rely on carriers' agreements concerning rates.

The Commission must recognize that it is not possible to resolve pole attachment access and rate complaints quickly enough to meet carriers' needs for prompt access so that they can construct their facilities in time to comply with prospective customers' deadlines. By decoupling the issues of access and rates, however, the Commission can rely primarily on negotiations to establish the rates, terms and conditions for pole attachments without abdicating its statutory responsibility to constrain the superior bargaining power of pole-owning utilities and their resulting ability to win through delay.

C. The Commission Should Clarify that Good Faith Requires Utilities to Agree to Appropriate Most Favored Nations Provisions.

Finally, the Commission should clearly state that where a utility seeks to negotiate a rate that is higher than the rate determined pursuant to § 224(e), good faith requires that it agree to an appropriate most favored nation clause. Under § 224, a utility must provide access to its poles, ducts, conduits and rights-of-way upon nondiscriminatory rates, terms and conditions whether rates are set by the Commission or by agreement. A utility cannot claim that it is negotiating in good faith while seeking to reserve the right to discriminate in favor of another carrier, whether the lower rate to the other carrier is established by agreement or as the result of a rate complaint. Accordingly, the Commission should rule that a telecommunications carrier may attach its facilities to a utility's poles, ducts, conduits and rights-of-way for up to one year without reaching agreement on rates and should declare that the concept of good faith negotiation is inherently inconsistent with any attempt to reserve the right to discriminate.

III. Use of Assigned Attachment Space

A. In Order to Foster the Development of a Competitive Facilities-Based Telecommunications Market the Commission Must Not Permit Utilities to Restrict, Condition, or Charge Additional Fees for Dark Fiber Leasing by Attaching Entities.

At a number of places in the NPRM, the Commission raises issues concerning dark fiber leasing by a telecommunications carrier that attaches facilities to utility poles, ducts, conduits and rights-of-way. The ability freely to lease dark fiber is important to the development of a competitive telecommunications market. Telecommunications carriers seeking to construct highly reliable networks today generally seek to install redundant facilities over different routes, often using the SONET ring topology. A carrier constructing a SONET ring entirely by itself must bear the labor and material costs of installing cable over two complete routes. Through dark fiber leasing, multiple carriers can achieve construction economies by installing larger cables over single routes and leasing or exchanging dark fibers among themselves, thus avoiding significant labor costs. Such savings help offset the scale economies available to incumbent LECs and shorten time to market for new entrants.

ICG has encountered several electric utilities that have objected to dark fiber leasing by telecommunications carriers who attach to their poles, ducts, conduits and rights-of-way and others who have demanded the right to approve carriers' fiber leasing transactions. Some of these utilities contend that dark fiber leasing is prohibited by contractual provisions limiting the right to assign a pole attachment agreement to a third party, a position asserted by Texas Utilities Electric Company and rejected by the Commission in *Marcus Cable Associates, L.P. v. Texas Utilities Electric Co.*, 1997 FCC

LEXIS 3803 (Cable Services Bureau July 21, 1997). At least one utility's proffered pole attachment agreement would have prohibited ICG from leasing dark fibers from any other entity having attachments on or in the utility's poles, ducts, conduits and rights-of-way. Utilities have even sought to dictate the price for attaching parties' dark fiber leases and when faced with objections to illegal price fixing have sought to prohibit dark fiber leasing altogether. Some utilities appear to be motivated by the desire to protect their own competitive positions as lessors of dark fibers. Other utilities express a vague, general, but compelling desire to control the purposes for which their poles, ducts, conduits and rights-of-way are used, although their real motivations and objections are not articulated.

The Commission's pole attachment policies should continue to promote dark fiber leasing and should not retreat from the position articulated in *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utilities Electric Co.*, 6 FCC Rcd. 7099 (1991), recon. dismissed, 7 FCC Rcd. 4192, *aff'd sub nom. Texas Utilities Electric Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993), and *Marcus Cable*. An attaching entity that leases dark fibers does not by that transaction impose any burden or obligation on the utility that owns the poles, ducts, conduits and rights-of-way on and in which it installs its cables. While it is reasonable for a utility to require a dark fiber lessee to have its own pole attachment or conduit lease agreement before it is permitted to install its own facilities or perform its own work on or in the utility's facilities, or alternatively, to require an attaching entity to be operationally and financially responsible for the attachments and activities of its dark fiber lessees, and while it is reasonable for a utility to insist that it have the same

protection, through insurance, indemnity, or both, against claims by a dark fiber lessee or its customers that it has against claims by the attaching party and its customers,[9] it is not reasonable for a utility to prohibit or demand the right to approve leases of dark fibers or to charge additional fees when attaching entities lease their dark fibers to others.[10] The Commission should clearly so state and should act expeditiously on complaints that utilities are seeking to limit dark fiber leasing by attaching entities.[11] The Commission should not permit utilities to restrict, condition, or charge additional fees for the leasing of dark fiber by an attaching telecommunications carrier.

B. Access and Rate Policies that Encourage Overlashing While Requiring Coordination with Pole Owners and Other Users Will Promote Cost-Effective Construction of Competitive Telecommunications Facilities.

The Commission has also sought comment on a number of issues related to overlashing, the practice of installing a telecommunications cable on poles by fastening it to an existing cable or to the same support messenger used by an existing cable. Overlashing is often less expensive than other methods of installing cables on poles, thus reducing the cost of facilities-based competition. Overlashing a new cable onto an existing one or onto another cable's support messenger often permits the installation of

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[9] *Cf. Marcus Cable.* The degree of such protection that a utility may reasonably demand from an attaching party is a separate issue that the Commission has not adequately addressed to date.

[10] Utilities are, of course, entitled to charge pole attachment fees for separate facilities attached to their poles, ducts, conduits and rights-of-way by dark fiber lessees.

[11] The Commission should not distinguish between leases of dark fibers in "original" and overlashed cables, as there is no valid economic or operational basis for such a distinction.

an additional cable on a pole line without the necessity of rearranging existing attachments or replacing poles to make additional space available for the new cable. Because of these savings in makeready expenses, overlashing is almost always less costly than other methods of installing an additional cable on a pole line already in use by several attaching parties. Overlashing thus permits carriers inexpensively to upgrade their own facilities or, through cooperative arrangements with other pole users, to install new facilities in high density areas or major corridors. Because overlashing can reduce economic barriers to facilities-based entry into local exchange markets, the Commission's policies should encourage overlashing.

Overlashing does not, however, avoid entirely the need for makeready work. Any new cable, no matter how it is installed, places new stresses on a pole line that must be analyzed in order to determine the need for additional guys or braces or for the replacement of weaker poles. Because of the typically larger cross-section of an overlashed cable compared to two separate cables, overlashing often has a greater effect on wind loading than the installation of a separate cable. In extreme cases, the additional stress placed on a pole line by an additional cable may require a substantial upgrade of the entire pole line in order to ensure the structural integrity of the entire pole and line system. Failure to conduct appropriate engineering analyses and perform required makeready work before cable installation can lead to structural failure, presenting unacceptable risks to public safety, whatever the method of installation. These concerns are particularly acute on pole lines used by electric utilities, whether the poles are owned by the electric utility, the incumbent LEC, or another entity.

Because the pre-installation engineering requirements for overlashed cables are fundamentally no different from those required for any other method of installing cables on poles, utilities should be allowed to require parties overlashing existing cables to comply with the same permit approval process that applies to other installations, whether the existing cable is owned by the overlashing party or by another attaching entity. As urged by the Whitepaper Utilities, a party overlashing a cable over the facilities of another attacher should be required to have its own pole attachment agreement with the pole owner.[12] At the same time, utilities have an obligation to respond to overlashing applications in a timely manner, just as with any other permit applications, and they generally should permit attaching parties to perform their own engineering analyses and makeready work for overlashed construction if they permit them to do so for other construction.

An attaching party that overlashes its own cable should not be double-counted in the allocation of the cost of unusable space, any more than an electric utility should be counted more than once because of its multiple power conductors, neutrals, and grounds. Section 224(e) requires an equal apportionment of two-thirds of the cost of unusable space among all attaching entities. An attaching entity that overlashes its own cable does not thereby become two attaching entities. By the same token, a party that attaches its facilities by overlashing its cable over the cable or messenger of another attacher is an

[12] It should go without saying that an overlasher also must have the consent of the owner of the cable to which it is overlashing.

attaching entity that should be counted in the allocation of unusable space costs and should pay its allocated share of such costs.

The appropriate allocation of usable space is somewhat different for overlashed facilities than for other cables. If the Commission continues to presume or require an allocation of one foot of usable space per attachment, then a party that overlashes its own cable should still be allocated only one foot of usable space, and each party should be allocated six inches of usable space when one party overlashes another's cable or messenger. If the Commission requires or permits a usable space allocation of six inches for simple communications attachments below the safety space as discussed elsewhere in these Comments, however, a nine inch allocation of usable space may be appropriate in order to allow sufficient clearance around the larger cross-section of the cable combination. In such a case, a party that overlashed its own cable would be allocated nine inches of usable space rather than six, and each party would be allocated four and one-half inches of usable space (unless otherwise agreed between them) when one party overlashes another's cable or messenger.

By adopting access and rate policies that encourage overlashing while requiring appropriate engineering reviews and necessary makeready work, the Commission can promote cost-effective construction of competitive telecommunications facilities without impairing the structural integrity of poles. Although overlashing raises safety, reliability and engineering issues requiring coordination with the pole owner and possibly other users, overlashing should be freely permitted provided that such issues are appropriately resolved.

C. Utilities Requiring Permitting and Pre-Approval of Attachments Must Respond to Telecommunications Carriers' Applications in a Timely Fashion.

In the NPRM, the Commission notes that telecommunications carriers' use of attachment space must conform to the standards of § 224(f)(2) with respect to safety, reliability and generally applicable engineering standards. In that connection, the Whitepaper Utilities advocate a requirement that parties seeking access to utilities' poles to obtain an up-front permit and the utilities' preapproval to attach to ensure safety and the reliability and integrity of the poles, and to ensure that all attaching entities share in the costs of maintaining and operating the poles.

ICG agrees that attaching entities generally should be required to coordinate the installation of their facilities with the owner of the pole, duct, conduit or right-of-way and in some cases with other attaching entities. Failure to do so can result in safety problems and can increase makeready expenses for other parties because of inaccuracies in the utility's records, as well as the potential for uncompensated occupation of utility poles. All pole users benefit from the utility's role as a clearinghouse for safety and space assignment issues, and all suffer when that role is bypassed.

At the same time, utilities and the Commission must recognize that, while carriers must fulfill certain responsibilities in seeking pole attachments, utilities likewise have an obligation to respond in a timely fashion to permit applications and requests for makeready work and inspections. Despite such responsibilities, utilities frequently assign a low priority to pole attachment applications and makeready work, deserving attention only when their personnel are not otherwise occupied. As discussed in the context of rate negotiations, time to market is critical for competitive access carriers and local exchange

carriers, often having a greater impact on the viability of a route than the cost of construction or the level of pole attachment fees. Despite the impact of delays in permitting upon a carrier's ability to remain competitive, and despite the Commission's establishment in the Interconnection Order of a forty-five day deadline for responding to access requests, however, it is not uncommon for utilities to take months to process a permit application, even when little or no makeready work is required, and delays of six months or more in utilities' performance of makeready work are not rare. The Commission must clarify that utilities are obligated to process permit applications and perform makeready work in a timely fashion and should authorize telecommunications carriers to proceed without pre-approval when faced with unreasonable delays.

Pole attachment agreements often obligate attaching parties to pay utilities to process permit applications, and most utilities require advance payment of makeready expenses. These requirements create a corresponding obligation on the part of the utility to staff the relevant departments adequately to provide prompt approvals of permit applications and to perform makeready work in a reasonable time. Utilities that cannot comply with reasonable time requirements should delegate the permit review process to outside contractors or (as some utilities do) to attaching parties who have demonstrated an ability to comply with applicable engineering requirements and to correctly update the utility's records. Most telecommunications carriers are competent to perform the makeready work required for their own installations, at least if they are required to use contractors pre-

approved by the pole owner. Utilities cannot simply avoid these obligations by seeking to limit the number of poles or ducts for which a telecommunications carrier may apply.[13]

Another approach to dealing with this issue is to permit attaching parties to make their own determinations of available space based upon the utility's records, perform their own makeready work, and notify the utility of what they have done after the fact, while assuming the risk that they may be required to relocate their facilities because of the utility's previous assignment to another user of the space chosen to be occupied.[14] A utility adopting this procedure should be permitted to require attaching entities to use pre-approved contractors, but it should be required to permit any attaching entity to follow this procedure unless it has demonstrated a pattern of safety violations or other failures to follow sound engineering and construction practices or a failure to notify the pole owner of what has been done. Moreover, the Commission should authorize all telecommunications carriers to proceed to install facilities using qualified contractors, at their own risk of being required to accommodate a prior applicant, when utilities fail

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[13] In one case, a utility sought to limit ICG to no more than fifty poles per application and to prohibit the submission of an application while a previous application was being processed, while giving itself ninety days to review any application. Such restrictions would limit a carrier to constructing no more than about twelve route-miles per year. Although ICG was able to negotiate more flexible terms with the utility in question, it frequently encounters utilities who seek to limit the number of poles covered by an application or the frequency of applications but will not agree to deadlines for their processing of permit applications and makeready work.

[14] ICG's pole attachment agreement with Southwestern Bell Telephone Company adopts this approach, and it is ICG's understanding that most or all of AT&T's pole attachment agreements with BOCs do so as well.